~~Nos. 961 and 973~~

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted] 107

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

No. [redacted] 110

RAILWAY LABOR EXECUTIVES ASSOCIATION, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION BY THE INTERSTATE COMMERCE COMMISSION TO AFFIRM.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

June 20, 1956.

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CASES CITED

389606—56——1

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Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, the appellee Interstate Commerce Commission moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court has not been reported, but a copy is contained in Appendix A to the Jurisdictional Statement in No. 961, pp. 28–32. The Commission's decision (63 M. C. C. 91) is contained in Appendix D to the Jurisdictional Statement in No. 973, pp. 15a–46a.

STATUTES INVOLVED

The statutory provisions involved are set forth verbatim in Appendix D to the Jurisdictional Statement in No. 961, pp. 34–43.

QUESTIONS PRESENTED

1. Where the Commission, acting under Section 207 (a) of the Interstate Commerce Act, finds that the public convenience and necessity requires new or additional motor carrier service to be performed by a railroad controlled motor carrier, does the proviso of Section 5 (2) (b) of the Act, applicable to mergers and acquisitions, require that such motor carrier service be restricted to service auxiliary and supplemental to the rail service, regardless of the public need for transportation?

2. Whether the court below correctly held that the Commission's findings of fact are supported by substantial evidence.

STATEMENT

These are direct appeals taken under 28 U. S. C. 1253 and 2101 (b) from a final judgment, entered January 27, 1956, of a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325. The

judgment dismissed appellants' complaints seeking to set aside an order of the Interstate Commerce Commission (hereinafter called the Commission). The Commission's order, entered on November 22, 1954, granted an application by a motor carrier subsidiary of a railroad for a certificate of public convenience and necessity to transport property between Silvis, Illinois, and Omaha, Nebraska, over regular routes, serving designated intermediate and off-route points, and subject to certain conditions, but without imposing restrictions which would specifically limit the operations of the railroad subsidiary to services which are auxiliary to or supplemental of the rail service of the parent railroad.

Background.—On April 1, 1938, the Commission authorized The Rock Island Motor Transit Company (hereinafter called "Motor Transit", which was then and still is a wholly-owned subsidiary of Chicago, Rock Island and Pacific Railroad Company), to purchase the property and general commodity operating rights of the White Line Motor Freight Company which operated on U. S. Highway 6 between Silvis, Illinois (near the Mississippi River), and Omaha, Nebraska, with the following conditions here pertinent (Docket No. MC-F-445, *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 5 M. C. C. 451, 458):

> (2) that applicant shall not, if the authority herein granted be exercised, render service from or to, or interchange traffic at, any point other than a station on the lines of said railroad; (3) that the authority herein granted shall be sub-

> ject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that service shall be auxiliary or supplementary to train service of the railroad and shall not unduly restrain competition.

A certificate was issued to Motor Transit on December 3, 1941, following this purchase, in Docket No. MC–29130. On November 28, 1944, the Commission authorized Motor Transit to acquire the general commodity certificates and property of D. H. and J. H. Frederickson (Docket No. MC–F–2327, *Rock Island M. Transit Co.—Purchase—Frederickson*, 39 M. C. C. 824) covering certain routes connecting with the White Line Route, between Harlan, Atlantic and Oakland in Iowa, and Omaha, Nebraska (hereafter referred to as the Frederickson Route).

However, before a certificate covering the Frederickson Line purchase was issued to Motor Transit, the Commission, on February 5, 1945, reopened that proceeding (MC–F–2327), the proceeding relating to the White Line acquisition (MC–F–445), and Motor Transit's certificate proceeding in MC–29130, to determine what restrictions, if any, should be imposed to insure that the motor carrier service performed by Motor Transit would be limited to that which is auxiliary to, or supplemental of, the rail service of its parent company. After proceedings (40 M. C. C. 457 and 55 M. C. C. 567) in which Motor Transit offered no evidence as to the necessity for such restrictions but challenged the power of the Commission to impose them, the Commission, in April 1949, ordered that

Motor Transit's operations on the White Line and Frederickson Line routes be subjected to the following five conditions (55 M. C. C. 567, 597):

> 1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railroad Company, hereinafter called the railroad.
>
> 2. The Rock Island Motor Transit Company shall not render any service to or from any point not a station on a rail line of the railroad.
>
> 3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.
>
> 4. All contractual arrangements between the Rock Island Motor Transit Company and the railroad shall be reported to us and shall be subject to revision, if and as we find it to be necessary, in order that such arrangements shall be fair and equitable to the parties.
>
> 5. Such further specific conditions as we, in the future, find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

The Commission's *power* to impose the quoted restrictions was challenged by Motor Transit before a three-judge District Court for the Northern District of Illinois, which denied that power in *Rock Island Motor Transit Co.* v. *United States*, 90 F. Supp. 516 (November 29, 1949). However, that decision was

reversed and the Commission's power to impose those restrictions was finally sustained by this Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (February 26, 1951). A certificate of public convenience and necessity containing these restrictions was issued to Motor Transit on September 11, 1951.

However, on August 30, 1951, and prior to the issuance of the certificate dated September 11, the Commission issued to Motor Transit temporary authority to operate over the White Line and Frederickson Line routes, subject to the following restrictions:

> (1) No service to be performed for shipments originating at Chicago, Ill., or Omaha, Nebr., and destined to either of said points.
>
> (2) No shipment to be transported between any of the following points or through, or to, or from more than one of said points: Omaha, and collectively Davenport and Bettendorf, Ia., Rock Island, Moline and East Moline, Ill.
>
> (3) No single shipment to be handled on motor carrier billing weighing more than 2,000 pounds.

On November 1, 1951, the weight limitation was increased to a maximum of 5,000 pounds for any one shipment. Since August 30, 1951, Motor Transit has operated under this temporary authority over the routes in question.

The present proceeding.—The proceeding resulting in the order presently under attack arises out of an application for a *permanent* certificate of public convenience and necessity under Section 207 (a) of the Act filed by Motor Transit on October 26, 1951.

(Commission's Docket No. MC–29130 (Sub. No. 70)). The motor carrier service for which authority was requested in this application is described in detail at pages 91 and 92 of the Commission's report (63 M. C. C. 91 and 92). Leaving aside the requested route segment between Chicago and Silvis, Illinois, which the Commission denied on the ground that Motor Transit already possessed such authority (63 M. C. C., p. 108), the application in substance sought authority to serve points on the White Line and Frederickson Line routes, plus certain named off-line points, without the restrictions which the Commission had imposed in the certificate dated September 11, 1951, and which had been upheld by this Court.

A hearing before a hearing examiner was held on Motor Transit's application, and consumed 14 days between March 18 and May 22, 1952. In this hearing, in contrast with the earlier acquisition proceedings, Motor Transit presented extensive evidence as to the public need for its motor carrier service in the territory involved in the application. The hearing examiner issued a recommended decision on April 21, 1953, exceptions were filed, and oral argument was had before the entire Commission. On November 22, 1954, the Commission issued its report (63 M. C. C. 91) and order substantially granting Motor Transit's application, subject to the following conditions (63 M. C. C., p. 109; Jurisdictional Statement No. 973, Appendix D, p. 41a):

> (1) that there may be attached from time to time to the privileges granted herein such rea-

> sonable terms, conditions, and limitations as the public convenience and necessity may require, and
>
> (2) that all contractual arrangements between The Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties; * * *

The plaintiffs' petition for reconsideration was denied by the Commission on July 6, 1955.

The appellants in No. 961, being motor carriers and associations of motor carriers which actively opposed Motor Transit's application under Section 207 (a) filed their complaint in the District Court on July 20, 1955, seeking to set aside the Commission's orders. The appellants in No. 973, being railway labor organizations whose intervention in the proceeding the Commission had permitted on July 6 and September 9, 1955, filed their complaints in the District Court as intervening plaintiffs on October 24, 1955.

The District Court heard arguments on the case on December 15, 1955, and rendered its opinion on January 11, 1956 (Jurisdictional Statement, No. 961, Appendix A, p. 28). Judgment for defendants (*Ibid.* Appendix B, p. 32), was entered by the District Court on January 27, 1956. The Motor Carrier appellants in No. 961 filed notice of appeal on March 23, 1956, and the railway labor appellants in No. 973 filed such notice on March 26, 1956.

The District Court's opinion held that the Commission had power, under Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)) to grant a certificate to a motor carrier affiliate of a railroad without restricting service thereunder to that which is auxiliary to or supplementary to railroad service, provided there is a sufficient showing that public convenience and necessity required such unrestricted grant. In so holding, the District Court denied the contentions of the protesting motor carriers and the railway labor organizations that the requirement of the proviso to Section 5 (2) (b) of that Act (49 U. S. C. 5 (2). (b)), prohibiting acquisitions by a railroad, or its affiliate, of motor carrier operating rights except in those cases where the Commission finds that the proposed acquisition transaction "will enable such [railroad] carrier to use service by motor vehicle to public advantage in its [rail] operations and will not unduly restrain competition," must be applied in connection with a new service or extension-of-service application by a railroad or its affiliate for motor carrier rights. The lower court held the Section 5 (2) (b) proviso not to be an absolute limitation on the grant of a motor carrier certificate to a railroad or its affiliate; and that the policy expressed by Congress in such proviso, although it is to be considered by the Commission even in application cases under Section 207 (a), need not be applied by the Commission in those exceptional cases under Section 207 (a) where the public interest, convenience and necessity require the grant of un-

restricted authority to a railroad applicant for operating authority.

The District Court further held that the Commission's findings, to the effect that the public convenience and necessity justified the grant under the exceptional circumstances of the instant case, were supported by evidence in the record.

ARGUMENT

1. We contend, with the court below, that where the Commission, acting under Section 207 (a) of the Interstate Commerce Act, finds that unusual circumstances of public convenience and necessity require new or additional motor carrier service to be performed by a railroad controlled motor carrier, the proviso of Section 5 (2) (b), applicable to mergers and acquisitions, does not require that such motor carrier service be restricted to service auxiliary and supplemental to the rail service without regard to the public need for transportation. This result is compelled by the language, history and consistent administrative construction of the Act.

(a) The Commission's order in the instant case was issued pursuant to Section 207 (a) of the Act which provides that "Subject to section 210, a certificate shall be issued to any qualified applicant * * * if it is found that the applicant is fit, willing, and able * * * and that the proposed service * * * is or will be required by the present or future public convenience and necessity." It is Section 207 (a) which empowers the Commission to authorize new or additional motor carrier service. The proviso of

Section 5 (2) (b) provides, in effect, that where a railroad or its affiliate acquires an existing motor carrier, the Commission must find not only that the proposed acquisition is "consistent with the public interest" (as in any case in which one carrier acquires another), but also that the acquisition will enable the railroad to use motor carrier service to public advantage in its rail operations and will not unduly restrain competition. The appellants contend that Section 5 (2) (b) must be read into Section 207 (a) as prohibiting the Commission from authorizing a railroad affiliate (such as Motor Transit) to provide *new or additional* motor carrier service unless such service is restricted to that which is auxiliary and supplemental to the rail service of the parent Rock Island Railroad.

To begin with, Section 207 (a) simply provides that "*any* qualified applicant" may be authorized to provide new or additional motor-carrier service—as distinguished from the acquisition of an existing motor carrier operation. It contains no requirement that unusual or special conditions be imposed upon certificates issued to motor carrier subsidiaries of railroads. The omission of such a requirement is particularly significant because Section 207 (a) begins with the words "Subject to section 210," which prohibits a contract motor carrier or its affiliate from holding a common carrier certificate under Section 207 unless such a dual operation is approved by the Commission as being in the public interest. By thus specifying in Section 207 the dual transportation operations which it did not wish to be authorized without restriction,

the failure of Congress to refer to the restriction of Section 5 (2) (b) presumably means that it did not intend that restriction to be imported into Section 207. It cannot be presumed that this precise statutory language was eccentric or inadvertent, since the Congress might well have concluded that the competitive consequences of permitting a railroad to absorb existing motor carrier competitors must satisfy other standards than the public convenience and necessity which will support the authorization of new or additional motor carrier service.

(b) While the Commission has not treated the proviso of Section 5 (2) (b) as a rigid restriction upon the authority conferred by Section 207 (a), it has recognized, beginning with *Pennsylvania Truck Lines, Inc.—Control—Barker,* 1 M. C. C. 101 (1936), that the proviso also embodies a policy against general and unrestricted railroad entry into the motor carrier field. At the same time, in a series of cases beginning with *St. Andrews Bay Transportation Company Extension of Operations,* 3 M. C. C. 711 (1937), the Commission refused to read the proviso of Section 5 (2) (b) into Section 207 as a rigid limitation on the issuance of certificates of public convenience and necessity.

The Commission's construction of Section 5 (2) (b) and 207 (a) in certificate cases is consistent with the sparse legislative history of the proviso of Section 5 (2) (b) which indicates that the specific concern of Congress was to restrict railroads' acquisition of control of motor carriers. See *Hearings before House Committee on Interstate and Foreign Com-*

merce on H. R. 5262 and S. 1629, 74th Cong., 1st Sess. (1935), pp. 46, 337, 376; 79 Cong. Rec. 5655, 12206.

More significant, during the *Hearings before the Senate Subcommittee on Interstate Commerce on S. 3606,* 75th Cong., 3d Sess. (the 1938 amendments to the Motor Carrier Act), pp. 26–31, Senator Shipstead, after referring to the Commission's decisions in the *Barker* and *St. Andrews Bay* cases, *supra,* stated that it was "clearly the intention of Congress that [railroads] should be prohibited from acquiring or initiating motor truck or bus service under certain other conditions." Accordingly, he proposed an amendment which would have repeated in Section 207 what is now the proviso of Section 5 (2) (b). Senator Shipstead's amendment was supported by the motor carrier industry (*ibid.* 128–129) and opposed by the railroads (*ibid.* 157–164). Thereafter, Senator Shipstead withdrew his amendment for the reason that it appeared that the amendment would provoke a controversy and might delay the adoption of S. 3606 at that session. Sen. Rep. 1650, 75th Cong., 3d Sess., p. 3.

Thus, in 1938, with specific knowledge of the Commission's view that the proviso of Section 5 (2) (b) was not controlling in determining applications for motor carrier certificates under Section 207, Congress declined to avail itself of an opportunity to write the proviso into Section 207. Moreover, between the *St. Andrews Bay* case and February 1940, the Commission at least twice reiterated its view that the proviso of Section 5 (2) (b) was not rigidly controlling in cases under Section 207. *Interstate Transit*

Lines Extension—Verdon, Nebraska, 10 M. C. C. 665 (1938); *Santa Fe Trail Stages, Inc. Common Carrier Application,* 21 M. C. C. 725, 753 (1940). Nevertheless, in the general overhaul of the Interstate Commerce Act by the Transportation Act of 1940, Section 207 (a) was not changed. We submit that this post-enactment legislative history is persuasive evidence that the Commission has interpreted correctly the will of Congress. *United States* v. *American Trucking Associations,* 310 U. S. 534, 549–550.

(b) As noted above, beginning with the *St. Andrews Bay* case, *supra,* the Commission has long and consistently held that the proviso of Section 5 (2) (b) is not to be read into Section 207 (a) as a rigid limitation on the issuance of certificates to railroads or their affiliates. Nevertheless, from the beginning in such cases, the Commission has pointed to the public need for the additional motor carrier service to be performed by the railroad-controlled applicant and which probably could not or would not be met by existing motor carriers. See *Kansas City Southern Transport Co. Inc., Common Carrier Application,* 10 M. C. C. 221, 237–238 (1938); and 28 M. C. C. 5 (1941); *Santa Fe Trail Stages, Inc., Common Carrier Application, supra; Burlington Transportation Co. Extension—Council Bluffs,* 28 M. C. C. 783 (1941); *Rock Island Motor Transit Co. Extension—Wellman, Iowa,* 31 M. C. C. 643 (1942); *Texas & Pacific Motor Transport Co. Ext.—Point Blue, La.,* 47 M. C. C. 425 (1947); *Burlington Truck Lines, Inc. Extension—Iowa,* 48 M. C. C. 516 (1948).

From these cases, as well as from the many cases in which motor carrier service by rail affiliates has been restricted to service auxiliary and supplemental to the rail service, the Commission has evolved the general principle that

> the accomplishment of the purposes forming the national transportation policy, require that, *except where unusual circumstances prevail*, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service. (Emphasis added)

Rock Island Motor Transit Co.—Purchase—White Line Motor Freight, Inc., 40 M. C. C. 457, 473 (1946). Or, as stated otherwise by the Commission in the instant case (App. D to Jurisdictional Statement in No. 973, p. 31a):

> The main purpose for the policy of imposing the five above-quoted restrictions, or modifications thereof, was to prevent the railroads from acquiring motor operations through affiliates and using them in such a manner as to unduly restrain competition of independently operated motor carriers. This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, which the authorized

independent motor carriers have not furnished, except where it suited their convenience.

We submit that the Commission clearly has struck a reasonable balance between the general Congressional objectives of preventing rail domination of motor carriage and of satisfying the public need for transportation.

(d) We believe that this Court already has recognized implicitly the power of the Commission under Section 207 to authorize a railroad or its affiliate to perform motor carrier service which is not auxiliary and supplemental to the rail service. While the Court has not had occasion to consider squarely the precise question involved in this case, it has rendered three decisions in this general area.

Interstate Commerce Commission v. *Parker*, 326 U. S. 60, upheld the power of the Commission under Section 207 to authorize a subsidiary of a railroad to perform motor carrier service supplemental to the rail service even though existing motor carriers could arrange to perform the proposed service. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, sustains the power of the Commission to approve the acquisition of a motor carrier by a railroad affiliate upon conditions that will restrict the acquired motor carrier operations to service auxiliary and supplemental to the rail service. In *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U. S. 450, this Court held that the Commission is empowered to impose upon certificates issued under Section 207 to railroads or their affiliates substantially the same conditions which were attached to the approval of an

acquisition of an existing motor carrier in the *Rock Island* case.

There is no suggestion in any of these cases that this Court considered the proviso of Section 5 (2) (b) as an inflexible limitation upon the power of the Commission under Section 207 to issue a certificate of public convenience and necessity to "any qualified applicant." To the contrary, we find in this Court's *Rock Island decision* almost express approval of the Commission's long-established view that in certificate cases under Section 207, the proviso of Section 5 (2) (b) is a legislative policy to be taken into account, rather than a straitjacket. Thus, the Court stated (340 U. S., at 442) that—

> Rail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service. Those divergencies, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission. It is because Congress could not deal with the multitudinous and variable situations that arise that the Commission was given authority to adjust services within the limits of the Motor Carrier Act.

This Court in the *Rock Island* case cited with apparent approval (at least without express disapproval) excerpts from the Commission's decisions in which the "special circumstances" doctrine was announced and applied, in footnote 4 on p. 428 (*Rock Island Motor Transit Co.—Purchase—White Line Motor Freight*, 40 M. C. C. 457, 471, 473–474; *Kansas City Southern Tptn. Co. Common Carrier Applu.*,

10 M. C. C. 221, 237), and in footnote 21 on p. 442 (*Rock Island Motor Transit Co. Extension—Wellman, Iowa*, 31 M. C. C. 643, and *Rock Island Motor Transit Co.—Purchase—White Line M. Frt.*, 55 M. C. C. 567, 584.)

In view of the language and history of Section 207 and the proviso of Section 5 (2) (b) and their interpretation by the Commission and by this Court, we submit that the Commission clearly is authorized in appropriate circumstances, to empower a rail affiliate to perform motor carrier service which is not restricted to service auxiliary and supplemental to the rail srevice.[1]

2. The motor carrier appellants present the question of whether the record before the Commission supports the Commission's report and order authorizing Motor Transit to serve the points here involved, subject only to the conditions discussed hereafter (Jurisdictional Statement in No. 961, p. 3).

[1] The contention of the appellant labor organizations that the present case is simply a continuation or reopening of the prior proceeding involving Motor Transit's acquisition of the White Line and Frederickson Line routes, is merely another way of contending that regardless of the public need for transportation, a rail subsidiary may never be authorized to perform motor carrier service which is not auxiliary and supplemental to the rail service of its parent. As noted above, an application for a certificate under Sec. 207 (a) invokes considerations of public convenience and necessity which are not involved in an application under Sec. 5 (2) (b) for approval of a merger or acquisition. Also, in the instant proceeding, Motor Transit offered extensive evidence as to the public need for the service which the Commission has authorized; while in the earlier proceeding Motor Transit stood entirely upon its legal position that the Commission lacked power to impose the auxiliary and supplemental service restrictions.

However, they "concede that there was sufficient evidence of record to enable the District Court to sustain the Commission's order insofar as it authorized a bona fide auxiliary and supplemental service to be rendered to and from such relatively minor points as Brooklyn, Colfax, Marengo, Newton, Oxford, Victor, Walcott and Wilton Junction." But "to the extent that the Commission's order finds that unrestricted service by Motor Transit between such major points as Davenport, Cedar Rapids, Des Moines, Council Bluffs and Omaha is required by the public convenience and necessity, appellants contend that the District Court erred in failing to set aside the Commission's order for want of evidentiary support" (*Ibid.*, pp. 10–11).

The Commission's order was based upon the extensive evidence which is summarized in its report. Thus, it had before it the testimony of 111 shipper witnesses from 56 points on the routes in question as to their need for Motor Transit's service (Jurisdictional Statement in No. 973, pp. 22a, 33a–34a). Thirty-eight witnesses from other points, such as Kansas City, testified that they need to use Motor Transit's service to and from points on these routes (*Ibid.* p. 21a). There was particularly persuasive testimony from other motor carriers that only Motor Transit has provided adequate service on interchange shipments to points on the White Line and Frederickson Line routes (*Ibid.* pp. 20a, 33a).

The Commission found, and it is not disputed, that Motor Transit is the only carrier that has maintained

daily (generally at least five days a week) scheduled peddle operations over the entire White Line and Frederickson Line routes regardless of the volume of traffic available for movement in such operations (*Ibid.* p. 33a). Peddle operations consist of pick-up and delivery service, largely at smaller points and in less than truckload lots. Motor Transit is the only carrier with intra-state rights on these routes, because it is the policy of the Iowa State Commerce Commission to grant such rights to only one carrier on a given route (*Ibid.* 38a).[2] The Commission found, in effect, that the expensive peddle service can be performed only by a carrier authorized to handle both interstate and intra-state shipments. Thus, it noted that "The peddle service provided by Motor Transit has been based on interstate, intrastate, and rail-billed traffic. With these three kinds of traffic available it is patent that Motor Transit could provide better service to the public than the motor carriers who claim that they can take over Motor Transit's interstate motor-billed business" (*Ibid.* p. 38a).

Turning to what amounts to the motor carrier appellants' contention that the Commission erred in authorizing Motor Transit to serve the larger points on these routes, such as Davenport and Des Moines, which provide the more profitable truckload shipments, the Commission reasoned as follows (*Ibid.* pp. 38a–39a):

[2] We do not understand the apparent suggestion of the motor carrier appellants (Jurisdictional Statement in No. 961, p. 22, fn. 7) that the Interstate Commerce Commission should ignore if not attempt to abrogate, the policy of Iowa.

There is some evidence of a public need for the proposed truckload services of applicant, but it is not as convincing as that with respect to the peddle operations, and this is understandable because the other motor carriers operating in the area have usually provided satisfactory service on truckload shipments. There is also some evidence that the latter have refused to accept truckloads of low-rated commodities. In any event we feel that there is sufficient basis to warrant a complete grant of authority to applicant. This truckload "cream of the traffic," which to some extent has been handled by Motor Transit for many years without seriously affecting the expansion of its competitors' operations, should not be handed over to its competitors and Motor Transit expected to provide the expensive peddle services.

Acceptance of the opposing motor carriers' position would have the following results. They would be left to provide the peddle services on interstate motor-billed traffic, which alone will not justify the type of services heretofore rendered by Motor Transit, and all such traffic in truckloads. Motor Transit would be left with intrastate and rail-billed traffic, which will not warrant continuance of the operations conducted by it prior to August 30, 1951. The net result is clearly not in the public interest.[2]

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[2] In its report (*Ibid.* 20a–21a), the Commission summarizes the testimony of 8 interlining motor carriers as follows:

"Eight motor carriers have been and are interlining traffic with applicant, principally at Chicago and the Tri-Cities. Generally these carriers do not ordinarily experience any difficulty in interlining shipments destined to the larger points of population on U. S. Highway 6, such as Des Moines and Newton, but they are of the opinion that applicant must be in a position to

As the District Court in this case put it, "Actually the result of sustaining the motor carriers' position would be a privilege to them of giving the service now rendered by Motor Transit if they so desire and refusing to give it when it is economically not feasible. That would not appear to serve the public interest." (*Ibid.* p. 13a).

We submit that the Commission's conclusion as to the scope of motor carrier service which must be authorized in order to make commercially feasible the service which is clearly required by the public convenience and necessity is well within the bounds of the broad discretion which Congress has entrusted to it in such matters. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65, and cases there cited. Also, we believe that these unusual circumstances of public convenience and necessity clearly warranted the Commission in making an exception to its general policy that certificates issued under Section 207 to railroad subsidiaries should authorize only such motor carrier service as is auxiliary and supplemental to the rail service.

Moreover, it should not be overlooked that the Commission has imposed two conditions upon the motor carrier operating authority which it has given to Motor Transit:

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serve these points and to handle overhead traffic in order to provide the required service, particularly the expensive peddle operations at the smaller points to avoid sustaining a loss on the entire operation. Several of these carriers are members of the American Trucking Associations, Inc., which is opposing the application."

> (1) that there may be attached from time to time to the privileges granted herein such reasonable terms, conditions, and limitations as the public convenience and necessity may require, and (2) that all contractual arrangements between The Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties; * * *.

The second quoted condition was adopted by the Commission for the specific purpose of providing a continuous check upon any unfair subsidization of Motor Transit's motor carrier operations by the parent Rock Island railroad, and thus anticipates the appellant motor carriers' apprehension (Jurisdictional Statement No. 961, p. 24) that Motor Transit will drive them out of business.[4] The validity of this condition was sustained in *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, 436–444.

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[4] There is no challenge to the Commission's finding that the past "operations of [Motor Transit] have not unduly restrained competition, and there is no evidence that its proposed operations would produce such a result." (Jurisdictional Statement No. 973, p. 36a.)

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that these appeals present no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

JUNE 20, 1956.

CERTIFICATE OF SERVICE

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Robert W. Ginnane, General Counsel of the Interstate Commerce Commission, on whose behalf the foregoing Motion to Affirm is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On American Trucking Associations, Inc., appellant in No. 961, by mailing copies in duly addressed envelopes with first class postage prepaid to:

Peter T. Beardsley, Esq., and
Fritz R. Kahn, Esq.,
1424 16th St. NW.,
Washington 6, D. C.

2. On Regular Common Carrier Conference of American Trucking Association, Inc., appellant in No. 961, by mailing copies in duly addressed envelopes with first class postage prepaid to:

Roland Rice, Esq., and
Albert B. Rosenbaum, Esq.,
1111 E. St. NW.,
Washington 6, D. C.

3. On appellant motor carriers in No. 961 by mailing copies in duly addressed envelopes with first class airmail postage prepaid to:

Eugene L. Cohn, Esq.,
1 No. LaSalle St.,
Chicago 2, Ill.

Joseph E. Ludden, Esq.,
2130 South Ave.,
La Crosse, Wis.

Stephen Robinson, Esq.,
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Homer F. Bradshaw, Esq., and
Rex H. Fowler, Esq.,
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4. On Railway Labor Executives Association, et al., appellants in No. 973, by mailing copies in duly addressed envelopes with first class postage prepaid to:

Clarence M. Mulholland, Esq.,
Edward J. Hickey, Jr., Esq., and
James E. Highsaw, Jr., Esq.
620 Tower Bldg.,
Washington 5, D. C.

5. On the United States of America, appellee, by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff,
Solicitor General of the United States,

Department of Justice,
Washington 25, D. C.

Honorable Oliver Gasch,
United States Attorney for the
District of Columbia,
U. S. Court House,
Constitution Ave. & John Marshall Pl. NW.,
Washington, D. C.

6. On The Rock Island Motor Transit Company, Employees' Committee of The Rock Island Motor Transit Company, Traffic Bureaus and/or Chambers of Commerce of Davenport, et al., Shippers' Committee, et al., and Iowa State Commerce Commission, appellees, by mailing copies in duly addressed envelopes with first class airmail postage prepaid to:

Arthur L. Winn, Jr., Esq.,
743 Investment Bldg.,
Washington 5, D. C.

Alden B. Howland, Esq., and
John H. Martin, Esq.,
500 Bankers Trust Bldg.,
Des Moines 9, Iowa.

D. C. Nolan, Esq.,
405 Iowa State Bank Bldg.,
Iowa City, Iowa.

Irving E. Chenoweth, Esq., Iowa Commerce Counsel, and Conrad A. Amend, Esq., Assistant Iowa Commerce Counsel,
Iowa State Commerce Commission,
E. 12th & Court Ave.,
Des Moines, Iowa.

This the 20th day of June 1956.

ROBERT W. GINNANE.

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